Supreme Court, U.S.
FILED

981026 DEC 22 1998

No. _____

In The
Supreme Court
Of The
United States

October Term, 1998

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTINE O. GREGOIRE
Attorney General

Jay D. Geck*
William Berggren Collins
Assistant Attorneys General

P.O. Box 40100
Olympia, WA 98504-0100
Telephone: (360) 586-2697

Attorneys for Petitioner State of Washington

**Counsel of Record*

QUESTIONS PRESENTED

Respondent Indian tribes claim rights to harvest shellfish outside their reservations based on treaties securing a "*right of taking fish at all usual and accustomed grounds and stations...Provided, however, That, [the Indians] shall not take shell fish from any beds staked or cultivated by citizens.*" At treaty time, Indians harvested a variety of shellfish from natural beds on tidelands and along shorelines, but there was virtually no harvest of deep water shellfish, such as crab or shrimp, found on deep permanently submerged lands. After the treaties, Washington entered the union on an equal footing with other states, took title to the beds and shores of its navigable waters, and sold and leased tidelands to private individuals who received title to land and embedded shellfish. This case presents two questions:

1. Whether there is a treaty right to take half of an off reservation natural resource, such as deep water shellfish, where Indians did not take that resource at treaty time and where there was no historic dependence on that resource that would support an equitable allocation.

2. Whether, consistent with the treaty prohibition against taking shellfish from any beds staked or cultivated and the State's equal footing title and powers, tribes have any right to take shellfish from private tidelands or cultivated tidelands.

LIST OF PARTIES

The parties to the proceeding below were:

Petitioner: The State of Washington was the defendant/ appellant below.

Respondents Aligned With The State Of Washington: Four separate groups of private property owners and lessees intervened in the case and were aligned as defendants/ appellants below, including:

1. Puget Sound Shellfish Growers Association ("Growers"), intervenor defendants/appellants below, consists of Taylor United, Inc.; Olympia Oyster Company; G.R. Clam & Oyster Farm; Cedric E. Lindsay; Minterbrook Oyster Company; Charles and Willa Murray; Skookum Bay Oyster Company; and J & G Gunstone Clams, Inc.

2. Larry B. and Shirlee Alexander, Harold E. and Billie B. Bauer, James and Ann Carter, William J. and Jeanette Chase, Mrs. Frances A. Fellows, George L. Grader, Earl D. and Millicent Ann Hunsperger, Edward B. And Eleanor J. Krenz, H.J. Merrick, Gordon W. Moss, Sewall L. and Emma M. Reynolds, John D. Riach, Alva Hazel B. Robb, Irene D. Smith, and Providence Worley.

3. William and Charmond Adkins, Grace Boyd, Pierce W. and May H. Davis, Ms. Rosemary Duncan, James E. Hadley, James C. and Sarah H. Johnston, William and Jo Ann Kirsh, David A. Mitchell, Mr. Louis Nawrot, Robert and Sandra Stevenson, and Boon Ho Woo.

4. "26 Tideland and Upland Private Property Owners of Washington", Dan Buehler, Robert L. Davis, Bruce I. Fielding, Arthur J. Gerdes, Joe Hotts, Keith C. Heutson,

Commander John C. James, Richard Sayre Koch, Elaine C. Lefler, Joan Lemonds-Roush, John S. Lewis, Steven L. Luke, Edwards R. McMillan, Robert F. Newman, Mark A. Hysether, Arthur I. Price, Ray D. Randall, Cynthia Rasmussen, Robert G. Shanks, Axel Strakejahn, Leana Tracy, Stuart W. Turner, George B. Usnick, Lee S. Vincent, Joan Walker, and William E. Whitney, Jr.

Respondents: The plaintiffs, who were appellees/cross-appellants below, are The United States of America and the following Indian tribes: Muckleshoot; Nooksack; Upper Skagit; Squaxin Island; Lummi; Makah; Tulalip; Swinomish; Quileute; Puyallup; Hoh; Suquamish; Quinault; Confederated Tribes & Bands of the Yakima Indian Nation; Nisqually; Jamestown S'Klallam; Lower Elwha S'Klallam; Port Gamble S'Klallam; Skokomish; Sauk-Suiattle; and Stillaguamish.

THIS PAGE INTENTIONALLY LEFT BLANK

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 2

STATEMENT 2

A. The Treaties 3

B. Shellfish In Washington 4

1. Tribal Harvest Of Shellfish At Treaty Time 5

2. Modern Shellfish Harvesting 5

C. Private Ownership And Use Of Tidelands 6

D. Course Of Proceedings 7

1. The Original Salmon Case Framework For Reviewing Proof Of Treaty Time Salmon Harvests 7

2. In Paragraph G, The District Court Maintained Continuing Jurisdiction To Review Proof Of Treaty Time Shellfish Harvests 8

3. Trial Court Proceedings For Off-Reservation Treaty Right To Shellfish 9

4. Ruling By The Ninth Circuit Court Of Appeals 10

REASONS FOR GRANTING THE PETITION 12

A. Granting Tribes A Treaty Right To Deep Water Shellfish, That Were Not Taken At Treaty Time, Conflicts With Decisions Requiring Proof Of Treaty Time Activities 12

1. The Ninth Circuit's Opinion Conflicts In Principle With Prior Decisions Of This Court Requiring Proof Of Treaty Time Activity 13

2. The Ninth Circuit Decision Directly Conflicts With Decisions That Deny A Treaty Right Based On Failure To Prove Treaty Time Activity 16

B. Allocating Half Of Deep Water Shellfish To The Tribes Was Not Equitable And Conflicts With This Court's Rulings On Allocation 19

C. The Ninth Circuit Interpretation Of Treaty Rights To Take Shellfish From Private Lands And Cultivated Beds Conflicts With Decisions By This Court 22

1. Rejection Of The Equal Footing Doctrine Conflicts With Decisions Of This Court 22

2. The Ninth Circuit Failed To Apply *De Novo* Review To Determine Treaty Meaning 27

D. This Case Affects Thousands Of People And Properties 30

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Choctaw Nation v. United States
318 U.S. 423 (1943).....28, 29

City of Cincinnati v. Louisville & Nashville R.R. Co.
223 U.S. 390 (1912).....24

Coyle v. Smith
221 U.S. 559 (1911).....24

Crow Tribe v. Repsis
73 F.3d 982 (10th Cir. 1995), *cert. denied*,
517 U.S. 1221 (1996).....26

Eisenbach v. Hatfield
2 Wash. 236, 26 P. 539 (1891) 7

Hawkins v. Bleakly
243 U.S. 210 (1917).....24

Idaho v. Coeur d'Alene Tribe of Idaho
521 U.S. 261, 117 S. Ct. 2028 (1997).....22, 23, 26

Lac Courte Oreilles Band of Lake Superior
Chippewa Indians v. Wisconsin
653 F. Supp. 1420 (W.D. Wis. 1987) 15

Lac Courte Oreilles Band of Lake Superior
Chippewa Indians v. Wisconsin
758 F. Supp. 1262 (W.D. Wis. 1991) 17, 18

Martin v. Waddell
41 U.S. (16 Pet.) 367 (1842).....23

Mille Lacs Band of Chippewa Indians v. Minnesota
124 F.3d 904 (8th Cir. 1997), *cert. granted*,
No. 97-1337 (argued Dec. 2, 1998) 26

Miller v. Fenton
474 U.S. 104 (1985).....27

Montana v. United States
450 U.S. 544 (1981).....23, 26

Nollan v. California Coastal Comm'n
483 U.S. 825 (1987).....23

Oliphant v. Suquamish Indian Tribe
435 U.S. 191 (1978).....28

Parravano v. Babbitt
70 F.3d 539 (9th Cir. 1995), *cert. denied*,
518 U.S. 1016 (1996).....21

Pollard v. Hagen
44 U.S. (3 How.) 212 (1845) 23

Puget Sound Gillnetters Assn. v. United States Dist. Ct. for the W. Dist. of Washington
573 F.2d 1123 (9th Cir. 1978) 19

Sequim Bay Canning Co. v. Bugge
49 Wash. 127, 94 P. 922 (1908) 7, 23

Seufert Brothers Co. v. United States
249 U.S. 194 (1919).....14, 24

Shively v. Bowlby
152 U.S. 1 (1894).....10

United States v. Bresett
761 F. Supp. 658 (D. Minn. 1991).....17

United States v. Dion
752 F.2d 1261 (8th Cir. 1985) (*en banc*),
reversed in part, 476 U.S. 734 (1986) 16, 17

United States v. Michigan
471 F. Supp. 192 (W.D. Mich. 1979),
aff'd on other grounds,
653 F.2d 277 (6th Cir. 1981) 15

United States v. Texas
339 U.S. 707 (1950).....25

United States v. Top Sky
547 F.2d 486 (9th Cir. 1976) 17

United States v. Washington (*Shellfish* I)
873 F. Supp. 1422 (W.D. Wash. 1994).....1, 4, 6, 9, 10

United States v. Washington (*Shellfish* II)
898 F. Supp. 1453 (W.D. Wash. 1995).....1, 29, 30

United States v. Washington (*Shellfish* III)
157 F.3d 630 (9th Cir. 1998) ..... *passim*

United States v. Washington (*Washington* I)
384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*,
520 F.2d 676 (9th Cir. 1975), *cert. denied*,
423 U.S. 1086 (1976).....3, 7, 8, 15

United States v. Washington (*Washington* II)
459 F. Supp. 1020 (W.D. Wash. 1978).....8, 9, 15

United States v. Washington
909 F. Supp. 767 (W.D. Wash. 1995).....1

United States v. Winans
198 U.S. 371 (1905).....24, 25

Ward v. Race Horse
163 U.S. 504 (1986).....26

Washington v. Washington State Commercial Passenger Fishing Vessel Association (Fishing Vessel)
443 U.S. 658 (1979).....8, 11, 13, 14, 19, 20, 21, 27, 28

CONSTITUTIONAL PROVISIONS

Wash. Const. art. XV, § 1 7

Wash. Const. art. XVII, § 1 7

STATUTES

1889-90 Wash. Laws, at 431.....7

1895 Wash. Laws, ch. 178 §§ 54, 62 .....7, 8

1899 Wash. Laws, ch. 136, §§ 1, 3, 5 7

25 Stat. 676, 679
(Enabling Act).....6, 22

28 U.S.C. § 1254(1) 1

Treaty of Medicine Creek
10 Stat. 1132 (1855).....2, 3, 4

Treaty of Point Elliott
12 Stat. 927 (1859).....2

Treaty of Point No Point
12 Stat. 933 (1859).....2

Treaty with the Makah (Treaty of Neah Bay)
12 Stat. 939 (1859).....2

Treaty with the Qui-nai-elts (Treaty of Olympia)
12 Stat. 971 (1859).....2

OTHER AUTHORITIES

61 Fed. Reg. 279 (Jan. 4, 1996).....21

61 Fed. Reg. 28786, 28787-88 (June 6, 1996).....21

62 Fed. Reg. 700, 718 (Jan. 6, 1997).....21

Felix S. Cohen, *Handbook of Federal Indian Law*
ch. 8, § B.1, at 446 (1982 ed.).....12

THIS PAGE INTENTIONALLY LEFT BLANK

PETITION FOR WRIT OF CERTIORARI

The State of Washington respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS AND JUDGMENTS BELOW

The Ninth Circuit opinion superseding and amending its original opinion, denying rehearing, and rejecting the suggestion for rehearing en banc is reported at 157 F.3d 630 (App. at 1-49). The opinions of the district court (W.D. Wash.) are reported at 873 F. Supp. 1422 (1994) (App. at 51-93), 898 F. Supp. 1453 (1995) (App. at 95-134), and 909 F. Supp. 767 (1995) (App. at 135-148).

JURISDICTION

The Court of Appeals filed its opinion on January 28, 1998. App. at 4. All the parties filed timely petitions for rehearing. On September 25, 1998, the Court of Appeals amended its opinion on rehearing and rejected the suggestions for rehearing en banc. App. at 4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

---

[1] Shellfish growers and other private tideland and upland owners who intervened in this case have also filed Petitions For A Writ Of Certiorari. *See Puget Sound Shellfish Growers v. United States of America, et al.*, No. 98-_____; *Larry B. and Shirlee Alexander, et al., and William and Charmond Adkins, et al. v. United States of America, et al.*, No. 98-_____; *26 Tideland and Upland Private Property Owners ("UPOW") v. United States of America, et al.*, No. 98-_____.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns language in five Indian treaties that secured "the right of taking fish, at all usual and accustomed grounds and stations . . . *Provided, however*, That [the Indians] shall not take shell fish from any beds staked or cultivated by citizens". The five treaties are: Treaty of Medicine Creek, 10 Stat. 1132 (1855) (App. at 169-76); Treaty of Point Elliott, 12 Stat. 927 (1859) (App. at 177-86); Treaty of Point No Point, 12 Stat. 933 (1859) (App. at 187-94); Treaty with the Makah (Treaty of Neah Bay), 12 Stat. 939 (1859) (App. at 195-201); and the Treaty with the Qui-nai-elts (Treaty of Olympia), 12 Stat. 971 (1859) (App. at 203-09).[2]

STATEMENT

Respondent Indian tribes claim treaty rights to take shellfish from the deep waters and submerged beds of Puget Sound and the Pacific Ocean, and from the extensive tidelands of Washington. When Indians executed these treaties in the 1850s, they did not venture into deep waters to take shellfish, and, although treaty time Indians harvested many shellfish from natural beds on the tidelands, they agreed to take no shellfish from any beds that the influx of settlers would "stake or cultivate". The Ninth Circuit rulings on the tribal claim presents important questions of law and equity.

First, the Ninth Circuit decision conflicts with prior decisions by this Court and other circuits holding that the species, places, and practices secured by treaty are defined and

---

[2] The critical provisions of the treaties are substantially similar. For ease of reference, we will cite to the Treaty of Medicine Creek, 10 Stat. 1132 (1855) (App. at 169-76).

limited by the customs and practices of treaty-time Indians. The Ninth Circuit ruled that these treaties now reserve rights that Indians at treaty time did not exercise or even imagine. The tribes thus gained an allocation of valuable "deep water shellfish" fisheries which had developed as recently as the 1980s. The Ninth Circuit has changed rules for treaty interpretation and declared an absolute right to take half of all fish. This ruling displaces the people who pioneered these fisheries and the state's conservation and economic policies.

Second, the Ninth Circuit ruling affects the property interests of thousands of tideland owners and lessees. The Ninth Circuit has ruled that tribes may have rights to take shellfish from virtually any tidelands, including most private shellfish farms and beaches. Since statehood in 1889, Washington has sold or leased approximately half of its tidelands for private use, allowing its citizens to develop some of the finest shellfish farms in the world. The Ninth Circuit interpretation of the treaty interferes with over a century of sales, leasing, cultivation, and private use of shellfish beaches, and places a cloud on thousands of parcels of private property.

A. The Treaties

In 1854 and 1855, the United States negotiated treaties with Indians in the Washington and Oregon Territories. "The principal purposes of the treaties were to extinguish Indian claims to the land in Washington Territory and provide for peaceful and compatible coexistence of Indians and non-Indians in the area." *United States v. Washington* (*Washington* I), 384 F. Supp. 312, 355 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Each treaty ceded "all [Indian] right, title, and interest in and to the lands and country occupied by them". Treaty of Medicine Creek, art. I, App. at 169. Specific land was set apart as reservations,

and the United States paid annuities and provided education and training. *Id.* at art. II, art. IV; App. at 170, 171. The treaties also provided for a right outside reservation boundaries:

> "The right of taking fish, *at all usual and accustomed grounds and stations*, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however, That they shall not take shell fish from any beds staked or cultivated by citizens*[.]" Treaty of Medicine Creek, art. III, App. at 170 (emphasis added).

This "right of taking fish" is qualified. It is limited to "usual and accustomed grounds and stations", a phrase that refers to treaty time places and fishing. Shellfish gathering is further limited by the Shellfish Proviso which prohibits taking "shell fish from any beds staked or cultivated by citizens". Thus, the tribes' treaty right includes "taking [shell]fish, at all usual and accustomed grounds and stations" except for shellfish beds that are "staked or cultivated by citizens".

B. Shellfish In Washington

Tribes claimed half of all "shellfish" using a broad term to describe all marine mollusks, crustaceans, and creatures otherwise not described as fish or mammal. *United States v. Washington* (*Shellfish* I), 873 F. Supp. 1422, 1427 (W.D. Wash. 1994), App. at 52. These shellfish differ from anadromous fish such as salmon, which hatch in fresh water, migrate to the ocean where they reach mature size, and then return to fresh-water in predictable annual runs.

Deep water shellfish include crab, shrimp, sea urchin, and other animals that live on or in permanently submerged

lands up to hundreds of feet below the line of extreme low tide. Intertidal shellfish include clams, oysters, mussels, and other animals on beaches and tideflats that are exposed twice daily by the tides. Washington has extreme tidal fluctuations and extensive shorelines, which create thousands of acres of tidelands and shellfish beds. Shellfish are often immobile, such as embedded clams, or live on the ocean floor, like crab. Others swim in deep water, like squid and shrimp.

1. Tribal Harvest Of Shellfish At Treaty Time

Indians at treaty time harvested a wide variety of intertidal shellfish and made substantial use of the clams, oysters, and mussels available on extensive tideflats and shorelines. Minimal numbers of crab, urchins, and "deep water" animals were occasionally available to Indians using the shorelines. The evidence presented at trial established that over ninety-nine percent of crab, urchins, shrimp, and other species of "deep water shellfish" are taken from deep beds and waters, where Indians did not, or could not, take shellfish in the 1850s.[3] ER at 955-57, 965-73; SSER 31.

2. Modern Shellfish Harvesting

On many public tidelands, there are shellfish beds where tribes take up to half the shellfish, and the general public also takes shellfish. Some state tidelands are leased for private uses, including shellfish farming. On private tidelands, shellfish beds are real property and may be planted or improved for commercial or non-commercial purpose.

---

[3] The trial court and Ninth Circuit ruled that it did not matter where different species of shellfish were taken at treaty time (*United States v. Washington* (*Shellfish* III), 157 F.3d 630, 644, App. at 19) and therefore did not resolve unique exceptions, like the Makah tribe's proof of treaty time kelp lines or breath-hold diving for sea urchins. ER at 450; SSER at 793.

Except for minimal treaty time harvests along shallows and tidelands, deep water shellfish fisheries were discovered and developed long after treaty time. ER at 400-03, 452, 482-83. Deep water shellfish are now important fisheries. For example, dungeness crab in deep waters are taken primarily by modern crab fleets using three-foot steel frame traps weighing 60 to 120 pounds at depths up to 400 feet (and in "sport" crab seasons open to all). ER at 1127, 1133, 1136. Shrimpers use steel mesh traps at depths of 200 to 300 feet. Since 1940, annual crab landings are 1 to 3 million pounds from Puget Sound and 3 to 20 million pounds from ocean waters. ER at 1137-38.

Since the recent invention of scuba, divers have discovered fisheries for urchins, scallops, sea cucumbers, and giant geoduck (pronounced "gooey-duck") clams. Individual divers and the state invested money to develop these previously unused fishery resources. For example, since the late 1960s, the state has mapped and surveyed all the geoduck beds on its submerged lands. The state program conserved the resource and produced over $10 million dollars in annual revenue. ER at 577-79, 1207-30.

C. Private Ownership And Use Of Tidelands

Since treaty time, both the territorial and state governments have permitted the private occupation of tidelands. In 1863, the territorial government allowed people to occupy up to 10 acres of tidelands for planting oysters. In 1864, it permitted exclusive private use of natural oyster beds in south Puget Sound. *See Shellfish* I, 873 F. Supp. at 1433, App. at 62-63. In 1879, a person could obtain permission to claim 10 acres of oyster beds. *Id.* at 1440, App. at 75.

In 1889, Washington entered the Union "on an equal footing with the original States". 25 Stat. 676, 679, App. at 150. The Washington Constitution asserts ownership of "the

beds and shores of all navigable waters" (Wash. Const. art. XVII, § 1, App. at 152) and directs the legislature to plat and sell tidelands within two miles of each city. Wash. Const. art. XV, § 1, App. at 151. The Legislature often sold tidelands for shellfish purposes and "for commerce, trade or business". *E.g.*, 1895 Wash. Laws, ch. 178 §§ 54, 62; 1889-90 Wash. Laws, at 431. The Legislature also authorized leasing tidelands for shellfish cultivation. *E.g.*, 1899 Wash. Laws, ch. 136, §§ 1, 3, 5.

Two years after statehood, the Washington Supreme Court affirmed that the state had "full power to dispose of [tidelands], subject to no restrictions". *Eisenbach v. Hatfield*, 2 Wash. 236, 245, 26 P. 539 (1891). The Court also held that the state could lease tidelands for shellfish cultivation and that the embedded shellfish were part of the real property under Washington law. *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 131, 94 P. 922 (1908). Today, approximately half of all tidelands are owned or leased by private parties. These private lands are used for shellfish farming, residences, industry, and commerce.

D. Course Of Proceedings

1. The Original Salmon Case Framework For Reviewing Proof Of Treaty Time Salmon Harvests

In 1970, the United States brought suit against Washington to establish treaty rights to salmon and steelhead (anadromous fish) runs. In *United States v. Washington* (*Washington* I), 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), the district court ordered that fifty percent of the

harvestable anadromous fish runs at usual and accustomed grounds and stations would be allocated to tribes.

The court based its decision on each tribe's treaty time salmon fishing. The court held that the "words 'usual and accustomed' were probably used in their restrictive sense, not intending to include sites where salmon fishing was occasional or incidental". *Washington* I, 384 F. Supp. at 356. The court required the tribes to come forward with evidence of what fish were taken at treaty time and from where. Based on this evidence, it entered detailed findings of fact for each tribe's treaty time fishing to determine where treaty salmon fishing could continue today. *Id.* 359-82.

In *Washington v. Washington State Commercial Passenger Fishing Vessel Association* (*Fishing Vessel*), 443 U.S. 658 (1979), this Court affirmed, but only after reviewing exhaustive evidence that Indians "previously exercised" (*id.* at 678) a right to take salmon and "were heavily dependent upon anadromous fish for their subsistence". *Id.* at 665 n.6. The Court also ruled that the fifty percent allocation of anadromous fish runs was equitable because at treaty time the Indians "depended heavily on anadromous fish as a source of food, commerce, and cultural cohesion". *Id.* at 686.

2. In Paragraph G, The District Court Maintained Continuing Jurisdiction To Review Proof Of Treaty Time Shellfish Harvests

Washington I was expressly limited to anadromous fish. 384 F. Supp. at 400. The district court maintained continuing jurisdiction to determine off-reservation rights to shellfish and nonanadromous fish. *United States v. Washington* (*Washington* II), 459 F. Supp. 1020 (W.D. Wash. 1978). In "Paragraph G" of an "Order For Program To Implement

Interim Plan", the district court required tribes to come forward with "prima facie evidence" to support an off-reservation treaty right to nonanadromous fish and shellfish. To establish this treaty right, the district court required evidence of the "**species taken at treaty times, where (usual and accustomed grounds), and by what tribes (who are entitled to exercise treaty entitlement)**[.]" *Washington* II, 459 F. Supp. at 1038 (emphasis added).

3. Trial Court Proceedings For Off-Reservation Treaty Right To Shellfish

The case at bar began in 1989 when Respondent Tribes sought a determination, citing Paragraph G, of their treaty right to harvest shellfish outside reservations. Private parties intervened because the tribes claim the right to enter their tidelands and take shellfish they owned. In 1993, the United States appeared in support of tribal positions.

With regard to deep water shellfish, the court initially ruled that tribes must come forward with evidence of what species they took at treaty time and where.[4] After trial, however, the court concluded that evidence of historic use or non-use was immaterial because at treaty time "the Tribes had the absolute right to harvest any species they desired, consistent with their aboriginal title". *Shellfish* I, 873 F. Supp. at 1430, App. at 57. The court reasoned that "because the right to take any species, without limit, pre-existed the Stevens Treaties, the Court must read the 'right of taking fish' without any species limitation". *Shellfish* I, 873 F. Supp. at 1430, App. at 57. All harvestable shellfish on salmon fishing grounds were

[4] App. at 161 (Order Clarifying Prior Order Denying Summary Judgment Re Certain Species And Deep-Water Harvest); App. at 153 (Order Denying Summary Judgment Re Certain Species And Deep-Water Harvest).

allocated 50:50 between treaty tribes and other harvesters. *Id.*, App. at 58.

The district court accepted tribal arguments that the Shellfish Proviso did not protect all private land or cultivation, but protected only completely "artificial beds" created where there was never a "natural bed". *Id.* at 1441, App. at 78. Tribes could therefore harvest private and cultivated beds if a natural bed ever existed on that site. The court relied largely on the tribes' reconstruction "state-by-state [of the] legal landscape governing the shellfish industry". *Id.*. at 1432, App. at 61. The court concluded that "the shellfishing laws [of East Coast states] almost universally prohibited the 'staking' or 'cultivating' of natural shellfish beds". *Id.* The court assumed that "United States treaty negotiators were generally familiar with the East Coast shellfish industry and its practices" and applied the narrowest legal terms and policies of those eastern states. *Id.* at 1434, App. at 65. The court expressly rejected any duty to interpret the Shellfish Proviso in light of the Equal Footing Doctrine which presumes that every new state enters the Union free of any encumbrances on its tidelands and submerged lands so it stands on equal footing with the other states. *E.g., Shively v. Bowlby*, 152 U.S. 1 (1894); *Shellfish* I, 873 F. Supp. at 1443-44, App. at 80-81.

4. Ruling By The Ninth Circuit Court Of Appeals

On appeal, the Ninth Circuit adopted the district court's reasoning, that proof of treaty time deep water shellfish gathering was not required because the tribes reserved rights to do anything they theoretically had the right to do at treaty time. *United States v. Washington* (*Shellfish* III), 157 F.3d 630, 644 (9th Cir. 1998), App. at 19-20. Without addressing Paragraph G, it said that the law of the case was that "courts considering

fishing disputes under the Treaties have never required species-specific findings of usual and accustomed fishing grounds". *Shellfish* III, 157 F.3d at 644, App. at 19-20. It applied the fifty percent allocation to deep water shellfish and did not discuss the equitable factors for allocation identified in *Fishing Vessel* (443 U.S. at 686) except to address briefly the moderate living factor. *Shellfish* III, 157 F.2d at 652, App. at 33.

The Ninth Circuit also affirmed that the Shellfish Proviso refers only to beds cultivated or planted by private citizens where no natural bed existed. *Id.* at 647-49, App. at 25-28. The Ninth Circuit deferred to the district court's conclusion that the Shellfish Proviso incorporated East Coast shellfish law of the 1850s. "Given the deferential standard by which we review the district court's findings of historical fact and its findings regarding the intentions of the parties' negotiators, we conclude the district court did not err in interpreting the Proviso and we adopt its analysis as our own". *Id.* at 648, App. at 26. It adopted the district court's reasoning that the Equal Footing Doctrine does not apply to reserved treaty rights and applies only to fee simple ownership of tidelands. *Id.* at 645, App. at 20-23.

Finally, the Ninth Circuit ruled that tribes were not entitled to fifty percent of a grower's total crop, only fifty percent of what the natural harvest of the bed would have been in the absence of cultivation and enhancement. The shellfish growers, however, had the burden to "demonstrate what portion of their harvest is due to their labor, as opposed to what portion would exist absent the Growers' enhancement". *Id.* at 652-53, App. at 34.

Judge Beezer concurred in the decision reluctantly, feeling bound by law of the case. Judge Beezer believed that the claimed treaty shellfish rights "strain[ed] even the

deferential canons of Indian treaty interpretations". *Shellfish* III, 157 F.3d at 657, App. at 43. He felt bound by Supreme Court precedent, which he labeled "perplexing". *Id.*

REASONS FOR GRANTING THE PETITION

The Court should grant review because the Ninth Circuit's decision conflicts with fundamental rules of treaty interpretation established by this Court and followed by other courts. These rules for treaty interpretation have implications in this case, for ocean fisheries of the Pacific Ocean, and for any other treaty claim to natural resources. Moreover, as the Ninth Circuit recognized, the decision has an "enormous impact" on "thousands of homeowners, Tribal members, and commercial fishermen in the Puget Sound region" and the Washington coast. *Shellfish* III, 157 F.3d at 657, App. at 42.

A. Granting Tribes A Treaty Right To Deep Water Shellfish, That Were Not Taken At Treaty Time, Conflicts With Decisions Requiring Proof Of Treaty Time Activities

For nearly a century, in this Court and among the circuits, the species, places, and activities secured by treaty rights have depended on proof of treaty time activity.[5] This doctrine is at the heart of Indian Law jurisprudence and ensures that judicial definition of treaty rights matches what Indian signatories contemplated. Further, this doctrine ensures that

---

[5] Felix S. Cohen, *Handbook of Federal Indian Law* ch. 8, § B.1, at 446 (1982 ed.) ("Courts have generally taken the approach that the 'right to fish' includes the right to harvest those species of fish that were taken by the Indians at the time the treaty was negotiated, as shown by historical and anthropological evidence.").

the preemption of state powers is tailored to meet the treaty time purposes of the federal government.

The Ninth Circuit decision conflicts with this fundamental principle. It adopts the district court's erroneous ruling that Indian aboriginal title was a collection of theoretically unlimited rights and that treaties, therefore, secured rights not previously exercised or even imagined:

> "The fact that some species were not taken before treaty time—either because they were inaccessible or the Indians chose not to take them—does not mean that their **right** to take such fish was limited." *Shellfish* III, 157 F.3d at 644 (emphasis added) (quoting 873 F. Supp. at 1430), App. at 19.

Based on this analysis, the Ninth Circuit concluded that the tribes had a treaty right to take deep water shellfish, even though evidence presented at trial showed that Indians had no customary shellfish harvests from deep water at treaty time. That conclusion is wrong and conflicts with decisions of this Court and other circuit and district courts.

1. The Ninth Circuit's Opinion Conflicts In Principle With Prior Decisions Of This Court Requiring Proof Of Treaty Time Activity

In *Fishing Vessel*, this Court considered the treaty right to take salmon and other anadromous fish under these same treaties. The Court did not define the scope of the treaty rights based on the platonic notions about aboriginal title. Instead, the Court focused on rights "previously exercised" by the signatory Indians, stating:

> "The fishing clause speaks of 'securing' certain fishing rights, a term the Court has previously interpreted as synonymous with 'reserving' rights previous exercised". *Fishing Vessel*, 443 U.S. at 678.

The central holding of *Fishing Vessel*, that the treaties secure more than an opportunity to fish in common with other citizens, was grounded in the Indian understanding that they could continue specific treaty time fishing activities. The Court relied on the fact that the tribes "were heavily dependent upon anadromous fish for their subsistence and for trade with other tribes and later with the settlers". *Fishing Vessel*, 443 U.S. at 665 n.6. The Court also pointed to records of the negotiations to establish that the Indians understood that the treaties secured specific places and species being used by the signatory Indians.

> "[T]he United States negotiators promised, and the Indians understood, that the Yakimas would forever be able **to continue the same off-reservation** food gathering and fishing practices **as to time, place, method, species and extent as they had or were exercising**." *Id.* at 667 (emphasis added) (quoting trial court).

Fishing Vessel followed the Court's prior rulings that historic practices define the exact activity secured by treaty. In *Seufert Brothers Co. v. United States*, 249 U.S. 194 (1919), the question was whether Yakima Indians had a treaty right to fish on the Oregon side of the Columbia River. Once again, the Court did not base its decision on the theoretical ability of the tribe to fish on the Oregon side. The Court defined the treaty right by using well-known historic fishing activities. *Id.* at 198-99. "During all the years since the treaty was signed the [Yakima Indians] have been accustomed habitually to resort for fishing [on the Oregon side]. This shows clearly that their understanding of the treaty was that they had the right to resort to these fishing grounds[.]" *Fishing Vessel*, 249 U.S. at 198-99.

The district courts have looked to evidence of treaty time activity in interpreting other treaties that grant off-reservation treaty hunting and fishing. For example, in *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd on other grounds*, 653 F.2d 277 (6th Cir. 1981), the issue was the tribe's right to engage in subsistence and commercial fishing. According to the court, for the "right to exist in the first instance, it must be shown that the Indians were in fact using the resource". *Id.* at 213. "[T]he factual predicate for the reserved fishing right is the documented historic, ethno-historic, anthropologic, and archaeologic evidence proving that commercial and subsistence fishing was of significance to the Indians during treaty times." *Id.* The court then entered detailed findings of fact regarding treaty time fishing activity. *Id.* at 219-225; *see also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1426-29 (W.D. Wis. 1987) (making exhaustive findings about off-reservation hunting, fishing, and gathering activities).

The prior decisions in this case also adhere to the principle that a tribe must establish treaty time activity. In *Washington* I, the original decision adjudicating salmon rights, the district court entered detailed findings of which species of anadromous fish were taken, from where, and by which tribe. *Washington* I, 384 F. Supp. at 359-82. In Paragraph G, the district court explicitly required the same "prima facie evidence" of the "species taken at treaty times, where (usual and accustomed grounds), and by what tribes", before a tribe could exercise an off-reservation right to take different shellfish. *Washington* II, 459 F. Supp. at 1037-38. Thus, the Ninth Circuit was simply wrong in its view that the law of the case did not require "species specific findings of usual and

accustomed fishing grounds". *Shellfish* III, 157 F.3d at 644, App. at 19-20.[6]

2. The Ninth Circuit Decision Directly Conflicts With Decisions That Deny A Treaty Right Based On Failure To Prove Treaty Time Activity

The Ninth Circuit's decision that the treaty secures rights not previously exercised directly conflicts with circuit court and district court decisions that deny treaty rights to a tribe that fails to prove the specific right was exercised at treaty time.

In *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985) (*en banc*), *reversed in part*, 476 U.S. 734 (1986)[7], the United States prosecuted a tribal member for violating the Eagle Protection Act and the Endangered Species Act by killing and selling bald and golden eagles. The court recognized that the tribe's treaty right to hunt existed and was "not much less necessary to the existence of the Indians than the atmosphere they breathed". *Id.* at 1264. Nevertheless, the Eighth Circuit ruled there was no treaty right to hunt eagles for commercial purposes because the defendant:

---

[6] For example, the district court's jurisdiction was invoked pursuant to Paragraph G to determine the treaty right to nonanadromous herring. After considering anthropological evidence the district court concluded that some tribes had established a right to the herring fishery while others had not. *Order On Requests For Determination Re Herring Fisheries*, dated March 28, 1975 (App. at 163-67).

[7] The issue before this Court in *Dion* was whether the Eagle Protection Act abrogated a treaty right to hunt eagles for religious purposes, an activity that occurred at treaty time. The Court concluded that the treaty was abrogated. The tribal member did not contest the court of appeals' ruling that there was no treaty right to hunt eagles for commercial purposes, and that issue was not before this Court. *Dion*, 476 U.S. at 736 n.2.

> "[P]resented no historical evidence of a Yankton Sioux practice of selling parts or carcasses of eagles . . . . We find that the Yankton Sioux would not have understood the treaty as reserving in them a right to sell eagles . . . . Accordingly, the defendants do not have a treaty right to sell such birds." *Dion*, 752 F.2d at 1264; *see also id.* at 1265 n.11.

The Ninth Circuit's decision also conflicts with *United States v. Top Sky*, 547 F.2d 486, 487-88 (9th Cir. 1976). This case also concerned a federal prosecution of a tribal member for selling eagle feathers. The tribes had a treaty right to "hunt on the unoccupied lands of the United States" but, after an evidentiary hearing, the trial court concluded that there was no "historical evidence in the presented case that discloses a pattern of sale of eagle parts". *Id.* at 487. The Ninth Circuit concluded that "it would be contrary to the expectations of the Indians to interpret the 'right to hunt' to include the right to sell eagles commercially". *Id.* at 488.[8]

In the extensive Seventh Circuit litigation by the Lac Courte Oreilles Indians, the court recognized that treaty time Indians "exploited virtually every resource in the ceded territory, including numerous species of trees". *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 758 F. Supp. 1262, 1269 (W.D. Wis. 1991). The tribes argued that such use of trees at treaty time meant that the

---

[8] In *United States v. Bresett*, 761 F. Supp. 658 (D. Minn. 1991), the United States prosecuted a tribal member for selling migratory bird feathers in violation of the Migratory Bird Act. The court ruled in favor of the defendant but did not follow the analysis adopted by the Ninth Circuit in this case. Instead, the court distinguished *Dion* and *Top Sky* based on the "direct and circumstantial evidence" that the sale of migratory bird feathers was a treaty time activity.

treaty secured commercial timber cutting. The court relied on the principle that treaty time use defines treaty rights:

> "Ascertaining what the Chippewa were actually doing at the time of the treaties is a prerequisite to determining what they would have understood they were reserving." *Lac Courte Oreilles Band*, 758 F. Supp. at 1270.
>
> "[E]vidence did not show that the Chippewa exploited a timber resource, either for their own use or for commercial purposes. . . . There is no evidence to suggest that at that time the Chippewa would have had the equipment, knowledge and skills necessary to take *timber* from the forest, or that they would have even contemplated doing so." *Id.* at 1270-71.

The decisions by this Court, circuit courts, and district courts demonstrate that treaty meaning and Indian understanding is shown by examining actual treaty time hunting, fishing, or gathering.[9] Here, the lack of treaty time harvest of deep water shellfish confirms that Indians had no contemplation that the treaty secured rights in off-reservation shellfish beds that would be discovered a century later.

The Court should grant certiorari to review the Ninth Circuit's ruling that treaty time fishing is irrelevant to determining the particular locations and types of shellfish that were "usual and accustomed" and secured by treaty right.

---

[9] The state has continually emphasized that Indians need not use 1855 technology, but that 1855 fishing does define what places and fish were used by treaty Indians, and therefore what is secured by these treaties.

B. Allocating Half Of Deep Water Shellfish To The Tribes Was Not Equitable And Conflicts With This Court's Rulings On Allocation

The second reason for certiorari is that the Ninth Circuit's ruling creates a rule of automatic 50:50 allocation and conflicts with this Court's guidance on the equities that support allocation of natural resources to treaty Indians. If the Ninth Circuit had followed the analytical steps laid out in *Fishing Vessel*, it would have reversed the 50:50 allocation of deep water shellfish because Indians did not take or depend upon those shellfish resources at treaty time.[10]

Allocation was one of the major issues in *Fishing Vessel*. The district court and Ninth Circuit had based the 50:50 salmon allocation on an analogy to a co-tenancy. Judge Kennedy concurred to criticize the rationale for allocation. *Puget Sound Gillnetters Ass'n v. United States Dist. Ct. for the W. Dist. of Washington*, 573 F.2d 1123, 1136 (9th Cir. 1978) (J. Kennedy, concurring) ("Cotenancy is not synonymous with entitlement to equal shares. Nor does the right of a cotenant to partition provide guidance for an equitable division of fish."). On certiorari, this Court responded to this criticism and ruled that allocation was an equitable remedy and that a showing of historic dependence must precede allocation.

Where there is a treaty right, neither treaty nor non-treaty fishers "may deprive the other of a '**fair share**' of the

---

[10] Allocation also may be an issue for intertidal shellfish, although the question of when tribes have rights on "beds staked or cultivated" should be determined first to identify what intertidal shellfish resource is being allocated. If the resource is identified, then allocation of intertidal resources can apply the *Fishing Vessel* equities. Because Indians historically harvested intertidal shellfish, the primary equitable factor would be whether reasonable livelihood or "moderate living" needs are met.

[resource]". *Fishing Vessel*, 443 U.S. at 684. To set a fair share, a judge must begin by "determining [whether] at the time of the treaties the resource involved was necessary to the Indians' welfare". *Id.* at 685. If the resource involved was necessary to treaty time Indians, then the court can exercise its equitable discretion to "devise some apportionme that assure[s] that the Indians' reasonable livelihood needs [are] met". *Id.*

Fishing Vessel shows that historic dependence is the threshold question for any allocation, and that any allocation should not exceed reasonable livelihood needs:

> "[The trial court] first concluded that at the time the treaties were signed, the Indians, who comprised three-fourths of the territorial population, depended heavily on anadromous fish [salmon] **as a source of food, commerce, and cultural cohesion**. . . . **Only then** did it determine that the Indians' present-day subsistence and commercial needs should be met, subject, of course, to the 50% ceiling." *Id.* at 686 (emphasis added).

The Ninth Circuit here returned to a simplistic ruling that shellfish must be divided 50:50, reasoning that shellfish are part of the same treaty provision that secures salmon rights. The Ninth Circuit did not consider whether treaty time Indians depended on deep water shellfish resources "as a source of food, commerce, and cultural cohesion". *Id.* In stark contrast to this Court's reliance on treaty time dependence to justify the salmon allocations, the Ninth Circuit said that it did not matter that the deep water shellfish were "not taken before treaty time". *Shellfish* III, 157 F.3d at 644, App. at 19.

The equities for deep water shellfish are quite different from salmon. At treaty time, and immediately thereafter, the

Indians dominated the salmon fishery. "Not until major economic developments in canning and processing occurred in the last few years of the 19th century did a significant non-Indian fishery develop." *Fishing Vessel*, 443 U.S. at 668. The opposite is true in this case. The tribes did not take deep water shellfish at treaty time, and these resources were subsequently developed by the state and any interested fisher. No Indians were displaced.[11]

The Ninth Circuit's mechanical application of the 50:50 allocation already reaches beyond this case. United States regulatory agencies cite the Ninth Circuit decision to justify an automatic fifty percent allocation of ocean fisheries to tribes, without any equitable analysis as required by *Fishing Vessel*. *See* 62 Fed. Reg. 700, 718 (Jan. 6, 1997) (1997 Ocean Whiting allocation rejects Pacific Fishery Management Council's recommendation and allocates fifty percent to tribes notwithstanding lack of historic use); 61 Fed. Reg. 28786, 28787-88 (June 6, 1996); 61 Fed. Reg. 279 (Jan. 4, 1996) (dividing all ground fish); *see also Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996) (federal rules allocating salmon runs 50:50 to tribe with no off-reservation fishing rights).

As human population and demands outpace natural resources, other courts and agencies will face tribal requests for allocations. Certiorari is needed to provide important guidance and to resolve the conflict between the Ninth Circuit's mechanical allocation and *Fishing Vessel*'s equitable allocation.

---

[11] Repeated tribal assertions that broadly proclaim the importance of "shellfish" hide the distinction between heavy treaty time use of intertidal shellfish and the minimal treaty time use or complete non-use of the deep water shellfish fisheries.

C. The Ninth Circuit Interpretation Of Treaty Rights To Take Shellfish From Private Lands And Cultivated Beds Conflicts With Decisions By This Court

The United States obtained a complete cession of all Indian "right, title, and interest" in the lands that would become Washington, at the same time creating an off-reservation shellfish harvesting right limited by the Shellfish Proviso – that Indians shall not "take shell fish" from "any bed" that is "staked or cultivated". There are two conflicts that justify a Writ to review the tension between the tribes' cession and their claimed right to take shellfish on private lands or from cultivated tidelands. First, the Ninth Circuit decision conflicts with decisions of this Court by failing to interpret the treaty in light of the Equal Footing Doctrine. Second, the Ninth Circuit determined the legal meaning of this treaty right by deferring to findings by the trial court about the negotiators' intentions, failing to fulfill its appellate function to declare the legal meaning of the treaty.

1. Rejection Of The Equal Footing Doctrine Conflicts With Decisions Of This Court

The federalism framework presumes that all states enter the Union on an equal footing with the same fundamental powers as other states. Congress explicitly provided that Washington was "on an equal footing with the original States". 25 Stat. at 679, App. at 150.

The Equal Footing Doctrine presumes that during the territorial period, the federal government preserves the future state's title and sovereignty over tidelands and fisheries. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028, 2041 (1997) ("The principle which underlies the Equal Footing Doctrine and the strong presumption of state

ownership is that navigable waters uniquely implicate sovereign interests."). Like the Tenth and Eleventh Amendments, the Equal Footing Doctrine preserves the dual sovereignty of federalism. Only a clear and deliberate act by the federal government deprives a state of its title or sovereignty over tidelands and fisheries:

> "[A] court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States . . . and must not infer such a conveyance 'unless the intention was definitely declared or otherwise made plain,' . . ." *Montana v. United States*, 450 U.S. 544, 552 (1981).

See also Martin v. Waddell, 41 U.S. (16 Pet.) 367, 411 (1842) ("the grant to an individual of an exclusive fishery . . . will not be presumed . . . unless clear and especial words are used to denote it"); *Pollard v. Hagen*, 44 U.S. (3 How.) 212, 230 (1845) (a pre-statehood transfer of the bed of navigable waters would deprive a future state of "a numerous and important class of police powers").

The tribal shellfish right creates rights to cross both tidelands and uplands (subject to judicial conditions). It impairs the property interests of thousands of tideland and upland owners. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (property includes right to determine who crosses private beach); *Sequim Bay Canning Co.*, 49 Wash. at 131 (embedded shellfish are part of real property under Washington law). The Ninth Circuit, however, refused to consider how the treaty right should be examined in light of the Equal Footing Doctrine:

> "'[T]he Supreme Court has applied the Equal Footing Doctrine in one context only, namely when evaluating a

> claim of right to lands beneath navigable waters based upon an alleged conveyance or retention of fee simple ownership by the United States prior to statehood.'" *Shellfish* III, 157 F.3d at 645 (quoting the district court), App. at 21-22.

The Ninth Circuit's narrow focus on conveyances of fee simple ownership shows that the panel misunderstood the Equal Footing Doctrine and the dual sovereignty of federalism.[12] Thus, this case presents the important question of whether the Equal Footing Doctrine applies to treaty rights that would create permanent easements in tidelands depriving the future state of its full power to convey those lands and determine future uses.

The Ninth Circuit ruling conflicts in principle with this Court's ruling that applied the Equal Footing Doctrine to analyze rights created by these very treaties. In *United States v. Winans*, 198 U.S. 371 (1905), the United States argued that these treaties fixed "easements" to "usual and accustomed" fishing sites.[13] After concluding that Indians would have

---

[12] The Ninth Circuit is simply wrong when it describes the doctrine as limited to questions of conveyance of fee simple. *See, e.g., City of Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U.S. 390 (1912) (under Equal Footing Doctrine, federal government cannot deny Ohio power of eminent domain); *Coyle v. Smith*, 221 U.S. 559 (1911) (Oklahoma must be given power to locate its seat of government); *Hawkins v. Bleakly*, 243 U.S. 210 (1917) (Iowa must receive power to determine right to jury trial).

[13] The "easement" affirmed in *Winans* is further explained by the subsequent case of *Seufert Brothers Co. v. United States*, 249 U.S. 194 (1919). *Seufert* confirms that the "servitude" memorialized by treaty is not an undefined right of convenience for Indians to enter any private land that leads to any fishing site. The easement "exist[ed] only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year, that any person . . . must have known of them". *Id.* at 199.

understood that the treaties secured continued access on well known paths to the Columbia River, this Court addressed whether "the state acquired by its admission into the Union 'upon an equal footing with the original states,' the power to grant rights in or to dispose of the shore lands upon navigable streams". Winans, 198 U.S. at 382. The Court held that creating an easement on that path was within Congressional powers and the treaty memorialized the easement in a manner sufficient to overcome equal footing presumptions. *Id.* (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)).

The case at bar, in contrast, presents facts not addressed by *Winans.* Here, the Shellfish Proviso negates the implication that permanent easements are created and demonstrates that the future state's equal footing was not diminished.

The Ninth Circuit offered an alternative reason to avoid equal footing requirements:

> "'Because the Stevens Treaties must be construed as a reservation of rights by the Tribes, not a granting of rights by the United States, the *Shively* presumption and the Equal Footing Doctrine cannot play a role in the evaluating the existence or scope of the rights.'" *Shellfish* III, 157 F.3d at 645 (quoting district court), App. at 21.

This Court has rejected an analogous argument that the Equal Footing Doctrine can be defeated by a new state reserving rights. In *United States v. Texas*, 339 U.S. 707 (1950), Texas contended that it had been an independent country before statehood and had granted only specific rights to the United States. Texas argued that it "reserved" title to its "marginal seas". The Court, however, held that the equal footing framework mandated that the federal government must hold that marginal sea for national purposes. The equal footing

framework could not be avoided by a prestatehood reservation. *See also Idaho*, 117 S. Ct. at 2041 (state sovereignty and title over submerged lands "arises from the equal footing doctrine and is 'conferred not by Congress but by the Constitution itself'") (quoting *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977)).

Nor is the Ninth Circuit ruling consistent with the decision of *Montana v. United States*. To decide if the Crow Tribe reserved an interest in the riverbed crossing its reserved lands, this Court applied the Equal Footing Doctrine.

The Ninth Circuit ruling reflects confusion among circuit courts about how the Equal Footing Doctrine applies to analysis of treaty rights. In *Crow Tribe v. Repsis*, 73 F.3d 982, 991 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996), the court held that because treaty rights in that case were of a temporary nature, they could not overcome equal footing presumptions and the state therefore had full power to regulate tribal hunting after statehood. *See also Ward v. Race Horse*, 163 U.S. 504, 515 (1896). In contrast, the Eighth Circuit labels the Equal Footing Doctrine as a "defense" and applies a stringent test to determine if Congress intended to abrogate treaty rights at statehood. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 927, 929 (8th Cir. 1997), *cert. granted*, No. 97-1337 (argued Dec. 2, 1998).

Washington's conservation and economic policies, which designed tideland ownerships and encouraged cultivation, have been preempted without judicial determination that the federal government clearly intended to deny Washington its equal footing rights. Rather than preserving the rights of the future state, the Ninth Circuit makes the Shellfish Proviso a federal mandate that the future state never allow privatization or cultivation of tidelands

inconsistent with the laws and policies of select 1850s states. Washington is thus denied the fundamental power over use and development of shellfish beds that every other state received at statehood. The Shellfish Proviso thus presents an important issue of the federalism framework.

2. The Ninth Circuit Failed To Apply *De Novo* Review To Determine Treaty Meaning

The Ninth Circuit ruled that its interpretation of the treaty was controlled by "the district court's findings of historical fact and its findings regarding the intentions of the parties' negotiators". *Shellfish* III, 157 F.3d at 648, App. at 26. It limited its review of those findings to "clear error". *Id.*, App. at 27.

This Court has explained that where the status of an issue as "fact" or "law" is uncertain, a number of considerations are applied to determine if the appellate court is in a better position to address an issue *de novo*. *Miller v. Fenton*, 474 U.S. 104, 112-17 (1985). For example, *Miller* holds that the voluntariness of a confession is a legal inquiry, despite the factual uniqueness of each confession, because the issue has "a uniquely legal dimension" that examines the compatibility of the confession with the legal system and constitutional presumptions of innocence. *Id.*

The meaning of treaties is even more a question of law where an appellate court must apply its power to fully review all material information to ascertain meaning. *See, e.g.*, *Fishing Vessel*, 443 U.S. at 674-85. Treaty meaning is not a factual determination for a jury. Treaty meaning resolves questions of law and sets the rule of law for all future litigants through stare decisis.

The Ninth Circuit breaks with this precedent by confusing the trial court's "finding" that treaty negotiators knew of East Coast shellfish law with the ultimate question of

law about treaty meaning. Although treaty meaning is often described in terms of the intentions of the parties, this Court has always determined treaty meaning with a thorough and searching review of the record. *E.g., Fishing Vessel.*

The absence of thorough *de novo* review precluded the appeals court from weighing crucial information. First, the constitutional framework of equal footing that the future state should receive unencumbered title and sovereign power over tidelands is a "common notion" of the negotiators. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978) (using "common notions" of the negotiators).

Second, the appeals court should have put minimal weight on technical East Coast legal meanings of "staked" or "cultivated". In the prior salmon case, Washington argued that the fishing right should be interpreted based on intricacies of East Coast common law because there was a lawyer on Isaac Stevens' staff. This Court called the state's argument a "highly dubious assumption". *Fishing Vessel*, 443 U.S. at 677 n.23. A "treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians". *Id.* at 676 (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)).

Third, the appeals court should have considered the logical context of the Shellfish Proviso. The proviso limits "usual and accustomed" Indian shellfish gathering. However, if the proviso applies only where there was no natural shellfish bed, that site would not be "usual and accustomed". By adding the implied restriction against staking or cultivating a natural bed, the court rewrote the treaty "beyond [its] clear terms to remedy a claimed injustice". *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943). Here, the "claimed injustice" is the denial of Indian access to natural shellfish beds. That limit on

Indian use, however, fits the general cession, the influx of settlers, the subsequent private development, and the plain language.

Most significantly, *de novo* review would have also considered the 135 years of practical construction by the United States, the Indians, the territorial government, the state, and the citizens. The "practical construction adopted by the parties" is an important tool for determining treaty meaning. *Choctaw Nation*, 318 U.S. at 431-32. As the trial court determined, the state sold and leased tidelands with "no notice" that natural beds were somehow subject to permanent tribal claims. *Shellfish* II, 898 F. Supp. at 1457, App. at 97. The 1905 Commissioner of Indian Affairs assumed that sales and privatization were consistent with the proviso. App. at 211-13. Practical construction is especially appropriate here, because the Ninth Circuit's legalistic interpretation makes little sense. It is "difficult – if not impossible" to determine where natural shellfish beds existed prior to cultivation and enhancement by the myriad owners or lessees. *Id.* at 1462, App. at 107.[14]

Thus, this question of treaty rights to shellfish presents important issues about how an appellate court should determine the meaning of treaty language *de novo* by using material information in a well developed record.

---

[14] The trial court realized this too late and tried to alter its initial ruling so that any cultivation or enhancement of any bed (natural or not) meant that a bed was "de facto artificial" and therefore protected by the Shellfish Proviso. *Shellfish* II, 898 F. Supp. at 1462, App. at 107. The Ninth Circuit, however, rejected that modification. *Shellfish* III, 157 F.3d at 650 , App. at 30.

D. This Case Affects Thousands Of People And Properties

The Ninth Circuit ruling that these tribes may take half of all shellfish resources in deep waters of Washington State displaces the people that discovered, developed, and relied on those resources for their businesses. Half their fishing opportunity is given to tribes that invested neither money nor time to find and develop these fisheries. State economic and conservation laws that were once efficiently crafted for the public interest must be adjusted to plan, negotiate, and share each fishery with the separate tribes. *Shellfish* II, 898 F. Supp. at 1463-69, App. 108-120.

Further, tens of thousands of owners and lessees occupy about half of Washington's two thousand miles of salt water shoreline. The Ninth Circuit's interpretation requires permanent masters to determine locations of natural beds and set tribal shares where there has been a century of private use, and to hear claims when tribal harvesters damage private property. Certiorari should be granted to determine whether these treaties require judicial supervision of permanent, involuntary co-tenancies between tribes and these thousands of property owners.

CONCLUSION

For all the above reasons, this Court should grant the Petition For Writ Of Certiorari.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General

Jay D. Geck*
William Berggren Collins
Assistant Attorneys General
**Counsel of Record*

P.O. Box 40100
Olympia, WA 98504-0100
Telephone: (360) 753-6245

Attorneys for State of Washington
December 22, 1998